

Governmental Liability, Immunity and Article 6 of the ‘ECHR’.

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The prominence of the issue concerning the limits of Governmental liability in tort in the study of Maltese Administrative Law has survived the end of the distinction between acts ‘*iure imperii*’ and acts ‘*iure gestionis*’ as a determinant of State liability in our case law.

It may be that the question of ‘Governmental Liability in Malta’, eloquently brought to the fore by the late Professor Wallace Gulia through his book by the same title, published more than thirty years ago, raises so many intriguing questions about the nature and origins of Maltese Administrative Law that we simply cannot help keeping the subject on the agenda. The discussion is nevertheless not lacking in relevance. After all, the present being the result or, some would say the ‘funeral’, of the past, anyone taking an interest in the Administrative law of Malta may at least deem it proper to familiarise with the way in which the basis of that law was perceived in the late nineteenth and the early twentieth century and with how it changed and developed to become what it is today.

The study of what is sometimes termed an ‘identity crisis’ of Maltese Administrative Law also necessarily requires knowledge of its historical background.

The issue is however not just one of nostalgia or of purely historical or evolutionary interest. It may also have a bearing on the applicability of Article 6 of the European Convention on Human Rights and on the possibility for the individual to challenge an exclusion of State liability stipulated in the law.

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It is recognised that over the years legislators have found it appropriate to include provisions in various laws which grant immunity from proceedings to persons performing particular functions.

Such immunities or restrictions on liability are most common in matters concerning the exercise of judicial functions, the workings of the postal and telecommunications services, transportation and in other activities which in some legal systems are categorized as falling under a special legal regime regulating 'public utilities'. The internal functioning of the armed forces is also an area where such immunities from liability are not uncommon.

It is accepted that these immunities, particularly when they come in the form of restrictions on liability or of substitute systems of liability,⁴⁰⁴ are not *per se* incompatible with the rule of law or with the European Convention on Human Rights but their abuse by the legislator would be unacceptable to the enforcement bodies of the Convention.

In its judgement in the case of **Fayed v United Kingdom**⁴⁰⁵ the European Court of Human Rights stated that 'it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6(1) – namely that civil claims must be capable of being submitted to a judge for adjudication – if, for example a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons'.

A recent judgement of the Grand Chamber of the European Court of Human Rights in the case of **Roche v United Kingdom**, and the dissenting opinions delivered in the same, illustrate the questions raised by State immunity and the relevance of knowing its roots.

⁴⁰⁴ Vide paragraph c of the final provisions of the Council of Europe's Recommendation No R (84) 15 relating to public liability adopted by the Committee of Ministers on the 18 September 1984.

⁴⁰⁵ (1994) 18 EHRR 393 para 65

In that decision the historical aspect was referred to in particular for the purpose of determining whether a situation was such where there was no ‘civil right’ under domestic law, in which case Article 6(1) of the Convention would not apply, or whether an immunity only constituted a procedural bar to an action for the enforcement of a right, in which case Article 6 (1) would be applicable and the immunity would require justification.

The ‘Roche’ Case

Thomas Michael Roche served in the British army between 1953 and 1968. In 1981 he was diagnosed as suffering from a number of ailments which he suspected to result from tests of mustard and nerve gases in which he had participated, against extra payment, at the ‘Chemical and Biological Defence Establishment’ at Porton Down in 1962 and 1963.

Following an unsuccessful application for a service pension in 1991 Mr. Roche threatened proceedings against the Ministry of Defence alleging negligence, assault and breach of statutory duty by the Ministry.

A legal obstacle however stood in his way in the form of a provision of the Crown Proceedings Act 1947.

Section 10 of the Crown Proceedings Act provided that, ‘No proceedings in tort shall lie against the Crown for death or personal injury due to anything suffered by a member of the armed forces of the Crown’ if the Secretary of State issued a certificate accepting that ‘the suffering’ was attributable to service for the purpose of an award under a compensation scheme for disablement or death of members of the armed forces.

In practice one could see this section, as granting the Government the option to pre-empt an action for damages against it, by accepting to grant the serviceman a pension or other compensation. Mr. Roche claimed, *inter alia*, that this option granted to the Secretary of State to exclude proceedings in tort against the State

by issuing such a certificate violated article 6 of the European Convention on Human Rights on the basis that it denied the 'right to a court' guaranteed by that Article. The issue of the compatibility of State immunities and of special systems of State liability not involving the courts with Article 6 of the ECHR, which, guarantees the right to access to a court in the 'determination of civil rights and obligations', therefore came once more under the scrutiny of the European Court of Human Rights⁴⁰⁶.

The first and principal question to be answered on this matter was whether the applicant had a 'civil right,' as autonomously defined⁴⁰⁷ for the purposes of the Convention by the case law of

⁴⁰⁶ Other cases where the question as to whether domestic law merely imposed a procedural bar on an action or whether no 'substantive right' existed are *Ketterick vs United Kingdom* (1982) 5 EHRR 465, *Pinder v United Kingdom* (1984) 7 EHRR 464, *Fayed v United Kingdom* (1994) 18 EHRR 393, *Osman v United Kingdom* (1998) 29 EHRR 245, *Z v United Kingdom* (2001) 34 EHRR 97, *Tinnelly & Sons v United Kingdom* (1998) 27 EHRR 249, and *Fogarty v United Kingdom* (2001) 34 EHRR 302

⁴⁰⁷ "It is recognised, first, that the expression "civil rights" in article 6 of the Convention is autonomous: *König v Federal Republic of Germany* (1978) 2 EHRR 170 at 192-193, paragraph 88. This means that the concept of a "civil right" cannot be interpreted solely by reference to the domestic law of the member state. It is the view taken of an alleged right for Convention purposes which matters. But, secondly, the Strasbourg case law is emphatic that article 6(1) of the Convention applies only to civil rights which can be said on arguable grounds to be recognised under domestic law; it does not itself guarantee any particular content for civil rights in any member state: see, for example, *Z v United Kingdom* (2001) 34 EHRR 97 at 134-135, 137, paragraphs 87, 98. Thus for purposes of article 6 one must take the domestic law as one finds it, and apply to it the autonomous Convention concept of civil rights. It is evident, thirdly, that the Strasbourg jurisprudence has distinguished between provisions of domestic law which altogether preclude the bringing of an effective claim (as in *Powell and Rayner v United Kingdom* (1990) 12 EHRR 355 and *Z v United Kingdom* (2001) 34 EHRR 97) and provisions of domestic law which impose a procedural bar on the enforcement of a claim (as in *Stubblings v United Kingdom* (1996) 23 EHRR 213, *Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249 and *Fogarty v United Kingdom* (2001) 34 EHRR 302). The European Court has however recognised the difficulty of tracing the dividing line between procedural and substantive limitations of a given entitlement under domestic law, acknowledging that it may be no more than a question of legislative technique whether the limitation is expressed in terms of the right or its remedy: see *Fayed v United Kingdom* (1994) 18 EHRR 393 at 430, paragraph 67. An accurate analysis of a claimant's substantive rights in domestic law is nonetheless the first essential step towards deciding whether he has, for purposes of the autonomous meaning given to the expression by the Convention, a "civil right" such as will engage the guarantee in article 6." –per Lord Bingham in '*Matthews v Ministry of Defence*' [2003] UKHL 4

the European Court of Human Rights , in terms of Article 6 to claim damages for tort against the Crown or whether he had no such right under domestic law in which case, there being no ‘civil right’ to determine, he would not be able to invoke Article 6.

The historical development of Governmental liability in the United Kingdom assumed cardinal importance in the debate on this question.

Prior to 1947 in the United Kingdom it was a well-established common law rule that the Crown was not liable in tort.

In his judgement in the case of **Matthews vs Ministry of Defence**⁴⁰⁸ Lord Bingham described the situation as follows:

*“Few common law rules were better established or more unqualified than that which precluded any claim in tort against the Crown, and since there was no tort of which the claimant could complain (because the King could do no wrong) relief by petition of right was not available”*⁴⁰⁹,

The effects of this rule were nevertheless mellowed in a number of ways. One practice allowed that the action be initiated against the civil servant who actually caused the injury, with the Crown ‘standing behind its delinquent servant’ if the latter had acted in the course of his duty and accepting responsibility for the payment of any damages awarded by the Court. Where the individual author of

⁴⁰⁸ [2003]UKHL 4, 13 February 2003

⁴⁰⁹ Quoting *Feather v R* (1865) 6 B & S 257 at 295-297, 122 ER 1191 at 1205-1206; and *Robertson: Civil Proceedings by and Against the Crown* (1908), pages 350-351.) In the nineteenth century several British cases held that the King could do no wrong and that there was therefore immunity from actions in tort. Vide *Viscount Canterbury v Attorney General* (1842) 11 PH 306; *Tobin v R* (1864) 16 CB (NS) 310.. It is also to be noted that the question of monarchical immunity (irresponsabilité) was also a feature of French law during the pre-revolutionary ‘ancien regime’ period with the principle ‘le Roi ne peut mal faire’ being used to describe the monarch’s legal status. Vide *Duncan Fairgrieve ‘State Liability in Tort’* OUP 2003

the act could not be identified there was the practice of appointing a nominee defendant in order to allow the case to proceed.

This notwithstanding, it was still felt that the Crown's position was unacceptable and a committee, chaired by the Lord Chief Justice was appointed in 1921 to propose amendments to the law. The Committee produced a draft bill and a short report in February 1927⁴¹⁰ which proposed to make the Crown liable in tort. However the same draft Bill provided for an exclusion of actions of members of the armed forces against the Crown 'in respect of any matter relating to or arising out of or in connection with the discipline or duties of those forces or the regulations relating thereto, or the performance or enforcement or purported performance or enforcement thereof by any member of those forces, or other matters connected with or ancillary to any matters aforesaid'⁴¹¹ The Bill was however not enacted.

In 1946 the House of Lords decision in the case of **Adams v Naylor**⁴¹² considered the practice of appointing a nominee defendant in cases where no individual civil servant could be identified as the author of the damage as unacceptable. The same judgement, and another judgement delivered shortly after by the Court of Appeal,⁴¹³ strongly urged changes in the law.

The Crown Proceedings Bill, based on the draft bill of 1927 but with a number of modifications, was published in 1947. It provided for the liability of the Crown in tort at par with a person of full age⁴¹⁴ but it still provided for the exclusion of claims against the Crown by members of the armed forces in relation to their duties.

⁴¹⁰ Crown Proceedings Committee: Report (Cmd 2842)

⁴¹¹ Clause 29(1)(g)

⁴¹² [1946] AC 543

⁴¹³ Royster v Cavey [1947] KB 204

⁴¹⁴ An outline of the Act is given in the Roche judgement at paras 76 et seq:

"The 1947 Act was divided into four parts: Part I "Substantive law" (sections 1-12 of the Act); Part II "jurisdiction and procedure"; Part III "judgments and execution"; and Part IV "miscellaneous".

78. Section 1 provides for the Crown to be sued as of right rather than by a petition of right sanctioned by Royal fiat.

79. Section 2 of the 1947 Act provides:

The exclusion was retained in section 10⁴¹⁵ of the Crown Proceedings Act 1947 with provision for compensation being made through a compensation scheme.

“2. Liability of the Crown in tort

(1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:-

(a) in respect of torts committed by its servants or agents;

(b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer;

(c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property;

Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action in tort against that servant or agent or his estate.”

⁴¹⁵ Section 10 of the Crown Proceedings Act, entitled ‘Provisions relating to the Armed Forces’ read as follows:

“(1) Nothing done or omitted to be done by a member of the armed forces of the Crown while on duty as such shall subject either him or the Crown to liability in tort for causing the death of another person, or for causing personal injury to another person, in so far as the death or personal injury is due to anything suffered by that other person while he is a member of the armed forces of the Crown if -

(a) at the time when that thing is suffered by that other person, he is either on duty as a member of the armed forces of the Crown or is, though not on duty as such, on any land, premises, ship, aircraft or vehicle for the time being used for the purposes of the armed forces of the crown, and

(b) the [Secretary of State] certifies that his suffering that thing has been or will be treated as attributable to service for the purposes of entitlement to an award under the royal Warrant, Order in Council or Order of His Majesty relating to the disablement or death of members of the force of which he is a member:

Provided that this subsection shall not exempt a member of the said forces from liability in tort in any case in which the court is satisfied that the act or omission was not connected with the execution of his duties as a member of those forces.

(2) No proceedings in tort shall lie against the Crown for death or personal injury due to anything suffered by a member of the armed forces of the Crown if-

(a) that thing is suffered by him in consequence of the nature or condition of any such land, premises, ship, aircraft or vehicle as aforesaid, or in consequence of the nature or condition of any equipment or supplies used for the purposes of those forces; and

(b) [the Secretary of State] certifies as mentioned in the preceding subsection: nor shall any act or omission of an officer of the Crown subject him to liability in tort for death or personal injury, in so far as the death or personal injury is due to anything suffered

Provision was later made for the exclusion of liability in tort to be suspended by means of the Crown Proceedings (Armed Forces) Act 1987 but this was not done retrospectively and Mr. Roche could not benefit from this change.

After having examined the decision of the House of Lords in the **Matthews** case⁴¹⁶, the European Court of Human Rights came to the following conclusion in the case of Roche:

“Drawing on the historical context, the text and purpose of, in particular, sections 2 and 10 of the 1947 Act, the House of Lords concluded that section 10 did not intend to confer on servicemen any substantive right to claim damages against the Crown but rather had maintained the existing (and undisputed) absence of liability in tort of the Crown to servicemen in the circumstances covered by that section. The Lords made it clear that prior to 1947 no right of action in tort lay against the Crown on the part of anyone. The doctrine that “the King could do no wrong” meant that the Crown was under no liability in tort at common law. Section 2 of the 1947 Act granted a right of action in tort for the first time against the Crown but the section was made expressly subject to the provisions of section 10 of the Act. Section 10 (which fell within the same part of the 1947 Act as section 2 entitled “substantive law” – see Lord Hope in the Matthews case at paragraph 94 above) provided that no act or omission of a member of the armed forces of the Crown while on duty should subject either that person or the Crown to liability in tort for causing

by a member of the armed forces of the Crown being a thing as to which the conditions aforesaid are satisfied.

(3)a Secretary of State, if satisfied that it is the fact:-

(a) that a person was or was not on any particular occasion on duty as a member of the armed forces of the Crown; or

(b) that at any particular time any land, premises, ship, aircraft, vehicle, equipment or supplies was or was not, or were or were not, used for the purposes of the said forces;

may issue a certificate certifying that to be the fact; and any such certificate shall, for the purpose of this section, be conclusive as to the fact which it certifies.”

⁴¹⁶ vide note 408

*personal injury to another member of the armed forces while on duty. Section 10 did not therefore remove a class of claim from the domestic courts' jurisdiction or confer an immunity from liability which had been previously recognised: such a class of claim had never existed and was not created by the 1947 Act. Section 10 was found therefore to be a provision of substantive law which delimited the rights of servicemen as regards damages claims against the Crown and which provided instead as a matter of substantive law a no-fault pension scheme for injuries sustained in the course of service.*⁴¹⁷

omissis

124. Accordingly, this Court finds no reason to differ from the unanimous conclusion of the Court of Appeal and the House of Lords as to the effect of section 10 in domestic law. It considers that the impugned restriction flowed from the applicable principles governing the substantive right of action in domestic law (Z and Others, § 100). In such circumstances, the applicant had no (civil) "right" recognised under domestic law which would attract the application of Article 6 § 1 of the Convention (Powell and Rayner v. the United Kingdom, cited above, § 36).

It is not therefore necessary also to examine the parties' submissions as to the proportionality of that restriction. It is further unnecessary to examine the Government's argument that Article 6 was inapplicable on the basis of the above-cited judgments in Pellegrin and R. v. Belgium.

125. The Court concludes that Article 6 is not applicable and that there has not therefore been a violation of that provision."

The judgement on Article 6⁴¹⁸ provoked dissenting opinions from eight of the Grand Chamber's seventeen judges with the following remarks by Judge Zupancic being particularly strong:

⁴¹⁷ Para 122

⁴¹⁸ The Court also found that there had been no violation of Article 1 of Protocol No 1 (16 votes to 1), no violation of Article 14 in conjunction with Article 6 and Article 1 of Protocol

“It is ironic that we should, precisely in British cases, build on the distinction between what is procedural and what is substantive. While the Continental legal systems have, for historical reasons, traditionally maintained the strictness of the distinction, it is precisely the common-law system which has always considered the right and the remedy to be interdependent.”⁴¹⁹ Is the remedy something “substantive”? Or is it “procedural”? Is the legal fiction “the Crown can do no wrong” – and the consequent blocking of action (immunity) – merely procedural? Or has the substantive right of the plaintiff simply been denied? As we move from one British case to another the dilemma appears in cameo. It is becoming clear that we need to resort back to common sense.

Omissis

A substantive right is its remedy.

It is ironic that so often common sense and common law should come into direct collision. It is doubly ironic that the majority should speak of avoiding mere appearances and sticking to realities when the distinction the judgment is built upon is pure legal fiction. We may have muddled through another case but the underlying false premise remains. The dilemma is certain to come back.”

The ‘dilemma’ and the doctrine of ‘iure imperii’

Could the ‘dilemma’ come back in a Maltese case?

No 1 (unanimously), no violation of Article 13 in conjunction with Article 6 and Article 1 of Protocol No 1 (16 votes to 1), and no violation of Article 10. The Court however unanimously found that there had been a violation of Article 8 of the Convention.

⁴¹⁹ “ 1. See more extensively, Zupancic, Adjudication and the Rule of Law, 5 European Journal of Law Reform 23-125, 2003.”

The doctrine of ‘*iure imperii*’ as defined in the landmark case of **Busuttil v La Primaudaye**⁴²⁰ has generally been interpreted as having effectively recognised Government’s immunity from actions in tort arising out of acts where the Government is acting in its capacity as political sovereign (*jure imperii*). It is also understood to have done so in a substantive and not in a merely procedural sense. Persons such as Busuttil, the silversmith who had claimed to have suffered damages because of the allegedly careless manner in which the police had taken control of his shop in connection with criminal proceedings, are considered not to have had a ‘civil right’ to sue the Government in tort.

This was subject to the ‘palliative’ of suing the individual officers who were responsible for the damage in their private capacity. The reference to the doctrine in the **Busuttil v La Primaudaye** judgement was based on the writings of the Italian authors Bonasi and Gabba but at the time when the judgement was delivered the doctrine also applied in France. In the famous **Arret Blanco** of the 8 February 1873 the Tribunal des Conflicts had decided that the administrative courts had jurisdiction to hear actions brought against the State for damages caused by persons which the State employs in the public service. Following that decision a number of governmental acts, defined as *actes d’authorite*’ whereby the administration exercised powers specific to the executive, were declared to be non-justiciable while the remaining acts of Government, known as *actes de gestion* could give rise to liability. The immunity prevailed until it was abandoned in the Conseil D’Etat decision of the 10 February 1905 in the case of *Tomaso Grecco* which involved a claim for damages against the police on account of alleged negligent use of a firearm. The claim was denied on the basis of lack of proof but the principle of “irresponsabilite” of the police when carrying out *actes d’authorite*’ was not upheld. The interpretation of the judgment of the Court of Appeal in the case of **Busuttil v La Primaudaye** is also still a matter for debate. The question is whether the judgment of the Court of Appeal in that case merely confirmed the First Hall’s judgement without

⁴²⁰ Civil Court First Hall, 15 February 1894, per Judge Chappelle

passing any comment, which appears to have been the interpretation adopted by Prof. Gulia in the introduction to 'Governmental Liability in Malta'⁴²¹, or whether it merely confirmed the judgement only on the basis of the principles of civil law and in particular of the principles of the law of tort regarding '*culpa in eligendo*'.

In his notes on 'Cases in Administrative Law' Prof. Ian Refalo interprets the **Busuttil v La Primaudaye** judgements as being 'no authority at all' that the Government enjoyed some form of immunity from liability when acting '*iure imperii*' and argues both that the Civil Court First Hall's judgement 'never came to the firm conclusion that the doctrine is applicable to Malta' and that the Court of Appeal upheld the first judgement 'applying solely the principles derived from Section 1037 of the Civil Code'. Unlike Professor Gulia, Professor Refalo interprets the 'golden' silence of the Court of Appeal as implying that 'one must therefore understand that the Court of Appeal was not endorsing the application of that doctrine'. If this interpretation were to be adopted, the 'civil right' to sue the Government in tort must be considered to have existed.

It is, of course now established that the doctrine of State immunity for acts '*iure imperii*' has been superseded at least since the judgement of the Civil Court First Hall in the important case of **Lowell vs Caruana**.⁴²² That judgment however did recognise that the doctrine did once form part of Maltese judge made law *inter alia* quoting the cases of **Galea v Galizia**⁴²³ and **Azzopardi v Malfiggiani**⁴²⁴

⁴²¹ 'All that the Appellate Court found in its power to say in respect of such far-reaching judgment is 'Concorrendo nelle conclusioni della Corte di prima istanza che(a concise recital of the facts).....Decide confermando l' appellata sentenza'.....although silence is golden, in this case it certainly amounts to acceptance in view of the decision.' ('Governmental Liability in Malta p 8)

⁴²² Civil Court First Hall, 14 August 1972

⁴²³ Court of Appeal, 8 November 1935, Vol XXIX.1.345

⁴²⁴ Commercial Court 5 January 1902, Vol XVIII.III.69

Nowadays governmental liability in tort or quasi-tort insofar as these result from ultra *vires* administrative acts is regulated by article 469A (5)⁴²⁵ of the Code of Organization and Civil Procedure and the Government may also be liable to pay compensation for breaches of Chapter IV of the Constitution on Fundamental Human Rights, of the European Convention on Human Rights, and for violations of EU law.

The doctrine of State immunity for acts '*iure imperii*' therefore appears to be strictly history as far as governmental liability in Malta is concerned.. It may still be relevant to keep in mind however that the rule that 'The King can do no wrong' also appeared to have been laid to rest in the United Kingdom almost sixty years ago through the Crown Proceedings Act 1947, or so Mr. Roche might have thought.

Given that the doctrine of *iure imperii* was neither introduced nor abrogated by legislative intervention and that it was superseded in case law prior to the enactment in 1995 of article 469A (5) and given the long span of time during which it served as a reference point in various judgements of our courts, it may not be completely safe to assume that the effects of the doctrine may not become a point of debate in some Article 6 case centring on the existence or otherwise of a 'civil right' against the Government in Maltese law.

In 1935 the Court of Appeal held in **Cassar Desain vs Forbes**⁴²⁶ that English Public Law applied in Malta but that the common law of England is not the common law of Malta. That dictum, which therefore appears to have excluded the applicability to Malta of the

⁴²⁵ 469A (5)" In any action brought under this article, it shall be lawful for the plaintiff to include in the demands a request for the payment of damages based on the alleged responsibility of the public authority in tort or quasi tort, arising out of the administrative act. The said damages shall not be awarded by the court where notwithstanding the annulment of the administrative act the public authority has not acted in bad faith or unreasonably or where the thing requested by the plaintiff could have lawfully and reasonably been refused under any other power."

⁴²⁶Court of Appeal 7 January 1935, Vol XXIX.1.43

common law doctrine that 'The King can do no wrong', may today be out of date. However in view of the large number of Maltese laws and Constitutional principles and provisions based on British counterparts, one can also never be too sure that the old British rule of monarchic immunity will not surprisingly spring to relevance in some Article 6 litigation as to whether in granting an immunity or in imposing a special system of liability the Maltese legislator, at the relevant time, was barring access to the courts or was merely retaining an immunity which was already in place at the time.

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August 2006